

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 JOSE LUIS BARAJAS CENTENO,
12 Plaintiff,
13 v.
14 CITY OF CARLSBAD; et al.,
15 Defendants.
16
17

Case No.: 19-cv-2098-L (DEB)

**ORDER DENYING PLAINTIFF'S
MOTION FOR SANCTIONS**

[DKT. NO. 66]

18 Before the Court is Plaintiff's "Motion for Sanctions Against Jordan Walker and
19 City of Carlsbad Defendants and Daniel Modafferi." Dkt. No. 66. In addition to Plaintiff's
20 Motion, the Court has received and reviewed Defendants' opposition (Dkt. No. 67),
21 Plaintiff's reply (Dkt. No. 75), the video footage at issue (Dkt. No. 89), and Plaintiff's
22 unsolicited supplemental filings (Dkt. Nos. 90, 93). On January 11, 2021, the Court held
23 oral argument and took the matter under submission. Dkt. No. 96.

24 Plaintiff's Motion seeks sanctions under Federal Rules of Civil Procedure 26(a)(2)
25 and (g)(3) for alleged discovery violations arising out of Defendants': (1) delayed
26 production of the arresting officers' body worn camera ("BWC") recordings; (2) alteration
27 of the BWC and third-party video recordings; and (3) service of an expert report that fails
28

1 to comply with Rule 26(a)(2). Dkt. No. 66. For the reasons discussed below, the Court
2 finds no basis to impose sanctions and DENIES the Motion.

3 **I. Factual and Relevant Procedural Background**

4 On the evening of April 27, 2019, Defendants City of Carlsbad Police Officers
5 Jordan Walker and James Gallivan approached Plaintiff as he was using a “slim jim” and
6 a flashlight to open his truck. Dkt. No. 104 at 1–2.¹ Plaintiff alleges he told the officers the
7 truck was his, but the officers became physically aggressive. *Id.* at 3. Plaintiff alleges the
8 officers pushed him to the ground, kicked him, handcuffed him, arrested him, and falsely
9 charged him with resisting arrest. *Id.* at 3–4. The state court dismissed the charge. *Id.* at 4.

10 Plaintiff has sued Officer Walker and Officer Gallivan for violating his civil rights
11 and for malicious prosecution. *Id.* at 1–9. Plaintiff has also sued the City of Carlsbad (the
12 City) pursuant to *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) and for malicious
13 prosecution. *Id.* at 9–12.

14 On November 27, 2019, the City and Officer Walker served their initial disclosures
15 which, among other things, disclosed the existence of the arresting officers’ BWC
16 recordings.² Dkt. No. 66 at 14. Thereafter, Plaintiff’s counsel informally requested that
17 Defendants produce the BWC footage. Dkt. No. 67-1 at 2, ¶ 6. Defendants responded they
18 would not do so without a formal discovery request. *Id.* ¶ 7, p. 19 (Ex. B). On January 11,
19 2020, Plaintiff propounded a Fed. R. Civ. P. 34 request for production of the BWC
20 recordings on Officer Walker. *Id.* ¶ 8. Officer Walker’s responses would have been due on
21 February 13, 2020, but on February 4, 2020, Magistrate Judge Linda Lopez vacated all
22 discovery related deadlines when the parties tentatively settled the case. Dkt. No. 27. On
23 March 9, 2020, after the parties were unable to finalize the settlement, Judge Lopez reset
24

25
26 ¹ When referencing page numbers for documents filed with the Court, the Court’s citation
27 refers to the page numbers assigned by the Court’s CM-ECF system.

28 ² Officer Gallivan was not added to the case until the January 29, 2021 filing of Plaintiff’s
First Amended Complaint and, thus, was not a party to the case at this time.

1 case management deadlines, including Officer Walker’s deadline to respond to Plaintiff’s
2 Rule 34 request. Dkt. No. 33 at 2. On March 30, 2020, Officer Walker timely responded,
3 explaining the BWC recordings were not under his custody or control and informing
4 Plaintiff “that responsive items are in the possession, custody, and/or control of the City of
5 Carlsbad.” Dkt. No. 67-1 at 22. Counsel then met and conferred and participated in a
6 conference call with Judge Lopez’s Chambers, after which Plaintiff propounded a Rule 34
7 request for the video recordings on the City. *Id.* at 3–4, ¶¶ 13–17. On May 28, 2020, the
8 City produced all responsive electronically stored information, including thirteen BWC
9 recordings. *Id.* at 5, ¶ 20, p. 39 (Ex. H). On June 1, 2020, Plaintiff’s counsel raised concerns
10 that the City or someone acting on Defendants’ behalf altered the video footage. Dkt. No.
11 67-1, ¶ 21, pp. 41–42 (Ex. I) (raising concerns that videos appear to be altered because:
12 (1) officers are not identified on BWC recordings; (2) some BWC recordings reflect an
13 April 28, 2019 date, whereas the subject incident occurred the prior day; (3) poor sound
14 quality; and (4) CBD00028-31 are four separate video clips from the same camera). On
15 June 10, 2020, Plaintiff propounded additional discovery requests for chain of custody
16 information for the videos. *Id.* at 5–6, ¶¶ 21–23, pp. 48–51 (Ex. K) and 54–57 (Ex. L). On
17 July 15, 2020, the City responded and denied under oath that the video recordings were
18 edited or altered. *Id.* at 6, ¶ 24, pp. 59–71 (Ex. M). On August 14, 2020, the City produced
19 documents establishing the chain of custody for each produced video. *Id.* at 6, ¶ 25, pp.
20 73–109 (Ex. N).

21 On August 28, 2020, the City and Officer Walker served their Initial Expert
22 Designation identifying retired Pasadena Police Chief Phillip L. Sanchez as their use of
23 force and policies and procedures expert. Dkt. No. 66 at 18–36. On October 13, 2020, the
24 City and Officer Walker served Mr. Sanchez’s Rule 26(a)(2)(B) expert disclosure. Dkt.
25 No. 67-1 at 6–7, ¶ 27, pp. 131-167 (Ex. P).

26 II. Legal Standards

27 When a discovery order is violated, the Court can sanction the offending party under
28 two sources of authority: Fed. R. Civ. P. 37(b)(2)(A) authorizes sanctions against a party

1 who “fails to obey an order to provide or permit discovery,” and, if the court finds bad
2 faith, it has the inherent power to sanction abusive litigation practices. *Roadway Express,*
3 *Inc. v. Piper*, 447 U.S. 752, 766-67 (1980) (remanding for consideration of sanctions under
4 Rule 37 and the court’s inherent power).

5 Fed. R. Civ. P. 26(g) also authorizes “appropriate” sanctions when an attorney or
6 party improperly certifies a discovery response. *See, e.g., R & R Sails, Inc. v. Ins. Co. of*
7 *Pa.*, 251 F.R.D. 520, 525 (S.D. Cal. 2008) (imposing sanctions under Rule 26(g)(3) for
8 counsel’s false certification that no electronic records existed without making a “reasonable
9 inquiry” as to their existence).

10 **III. Discussion**

11 **A. The City Timely Produced the Video Footage.**

12 Plaintiff complains that “Defendants did not disclose video recorded evidence until
13 May 28, 2020. More than six months after the [initial] disclosure, despite multiple requests
14 for the items of evidence. . . .” Dkt. No. 66 at 2–3. The Court finds no basis to impose
15 sanctions for any delayed production.

16 Fed. R. Civ. P. 26(a)(1)(A)(ii) states a party may comply with its initial disclosure
17 requirements by providing a “description by category and location” of documents that are
18 in its possession, custody, or control. *Accord Gardias v. Cal. State Univ.*, No. 09-cv-05291-
19 HRL, 2010 WL 3504826, at *1 (N.D. Cal. Sept. 7, 2010) (Fed. R. Civ. P. 26(a)(1)(A)(ii)
20 does not obligate a party to produce copies of documents as part of its initial disclosures,
21 and “[i]nstead, a party may simply provide a description by category and location of the
22 documents. . . .”). Thus, Defendants had no obligation to produce the videos with their Initial
23 Disclosures.

24 Although the Court encourages the parties to cooperate by producing relevant
25 materials without requiring a formal request, the Federal Rules of Civil Procedure do not
26 require the informal exchange of information. A party may have a legitimate reason for
27 requiring a formal discovery request, especially when confidential or sensitive information
28 is at issue. *See generally Gerawan Farming, Inc. v. Rehrig Pac. Co.*, No. 11-cv-1273-

1 LJO(BAM), 2013 WL 1982797, at *6 (E.D. Cal. May 13, 2013) (“Plaintiff cannot rely
2 solely on informal discovery requests to obtain documents, especially when the documents
3 contain Defendant’s sensitive and confidential financial information.”) Plaintiff’s informal
4 requests for the videos, therefore, did not give rise to any duty on the part of Defendants to
5 produce the BWC recordings.

6 When Plaintiff served a Rule 34 request on Officer Walker for the BWC recordings,
7 Walker responded that he did not have the recordings, and that they were under the City’s
8 custody and control. Dkt. No. 67-1 at 3, ¶¶ 12–13, pp. 21–27 (Ex. C). Counsel then met
9 and conferred and participated in a conference with Judge Lopez’s chambers, after which
10 Plaintiff’s counsel agreed to propound a new Rule 34 request to the City. *Id.* at 3–4, ¶¶ 14–
11 16. The City then timely produced the BWC recordings. *Id.* at 5, ¶ 20, p. 39 (Ex. H).

12 In sum, although Defendants put Plaintiff to his paces to obtain the videos,
13 Defendants did not violate any rule. The Court, therefore, finds no basis to impose
14 sanctions for any delayed production of the videos.

15 **B. The Court Finds no Evidence that Defendants Altered any Videos.**

16 Next, Plaintiff contends the Court should impose sanctions for Defendants’ failure
17 to disclose the identity of the individuals who altered the videos produced by the City.
18 Dkt. No. 66 at 6–10. The City has repeatedly denied the videos were altered. *See* Dkt.
19 No. 67-1 at 5, ¶ 22, pp. 45–46 (Ex. J), *id.* at 6, ¶ 24, pp. 59–71 (Ex. M).

20 Plaintiff’s allegation that the videos are altered is serious but unsupported. Plaintiff
21 has produced no analysis from an expert who has reviewed the videos. Nor has Plaintiff
22 supported his allegation with any declaration or testimony from any individual familiar
23 with the recording, handling, or production of the videos.

24 Instead, Plaintiff’s tampering allegations are based on certain discrepancies that
25 Plaintiff’s counsel has observed. For example, Plaintiff’s counsel notes some of the BWC
26 recordings do not have any audio for the first sixty to ninety seconds (Dkt. Nos. 90 at 3,
27 ¶ 14), and one bears an incorrect date (*id.* ¶ 13). Plaintiff also directs the Court’s attention
28

1 to CBD0028-31, four video clips taken of footage that was filmed by a private security
2 camera located near the scene of Plaintiff’s arrest. *Id.* ¶ 9.

3 Due to the seriousness of the allegations and Plaintiff’s lack of any substantiating
4 evidence, the Court directed Plaintiff to lodge the videos for in camera review. *See* Dkt.
5 Nos. 89, 93. The Court’s review of these recordings did not reveal anything from which
6 the Court could conclude that any were altered. To the contrary, all appear to be raw,
7 unaltered footage.

8 In sum, Plaintiff has produced no evidence supporting his allegation that the videos
9 were altered. The Court’s review of the videos did not reveal anything from which the
10 Court could make an independent finding that any video was altered. Instead, the most
11 logical conclusion is that the City produced the videos as is, without alteration.³
12 Accordingly, there is no basis to impose sanctions.

13 **C. Defendants’ Expert Disclosure is not Sanctionable.**

14 Plaintiff also seeks sanctions in connection with Defendants’ disclosures of its expert
15 witness, Mr. Sanchez. Plaintiff alleges that Defendants’ disclosures did not comply with
16 Fed. R. Civ. P. 26(a)(2). Specifically, Plaintiff argues that Defendants’ Initial Expert
17 Designation does not satisfy Rule 26(a)(2) because it was not accompanied by Mr.
18 Sanchez’s written report. Dkt. No. 66 at 3.

19 //

21
22 ³ The Court’s conclusion is reinforced by Plaintiff counsel’s argument that the BWC
23 footage establishes Defendants used excessive force. At oral argument, Plaintiff’s counsel
24 complained about one video that ended before the use of force occurred, but he described
25 other videos that depict the force that he contends proves Plaintiff’s case. Dkt. No. 103, at
26 4–5, lines 16–14. Similarly, Plaintiff’s counsel has represented in filings that, in the video
27 labeled “CBD0030,” Officer Walker kicks Plaintiff twice, once fifty-seven seconds into
28 the video and again at fifty-nine seconds. Dkt. No. 93 at 3, ¶ 12. Plaintiff counsel’s
characterization of these videos as evidencing Defendants’ use of excessive force is
inconsistent with Plaintiff counsel’s allegation that the City altered the videos to deprive
Plaintiff of relevant evidence.

1 Rule 26(a)(2) states:

2 (A) In General. In addition to the disclosures required by Rule 26(a)(1),
3 a party must disclose to the other parties the identity of any witness
4 it may use at trial to present evidence under Federal Rule of
Evidence 702, 703, or 705.

5 (B) Witnesses Who Must Provide a Written Report. Unless otherwise
6 stipulated or ordered by the court, this disclosure must be
7 accompanied by a written report—prepared and signed by the
8 witness—if the witness is one retained or specially employed to
9 provide expert testimony in the case or one whose duties as the
party's employee regularly involve giving expert testimony. The
report must contain:

- 10
- 11 (i) a complete statement of all opinions the witness will express
and the basis and reasons for them;
 - 12 (ii) the facts or data considered by the witness in forming them;
 - 13 (iii) any exhibits that will be used to summarize or support them;
 - 14 (iv) the witness's qualifications, including a list of all publications
15 authored in the previous 10 years;
 - 16 (v) a list of all other cases in which, during the previous 4 years,
17 the witness testified as an expert at trial or by deposition; and
 - 18 (vi) a statement of the compensation to be paid for the study and
19 testimony in the case.

20

21

22 (D) Time to Disclose Expert Testimony. A party must make these
23 disclosures at the times and in the sequence that the court orders.

24

25 Fed. R. Civ. P. 26(a)(2).

26 Judge Lopez's March 9, 2020 Order set the following expert disclosure dates: (1) an
27 August 28, 2020 deadline to designate expert witnesses; and (2) an October 13, 2020
28 deadline to serve expert reports. Dkt. No. 33. Consistent with this Order, on August 28,

1 2020, Defendants served Plaintiff with their Initial Expert Designation identifying Mr.
2 Sanchez as its use of force expert, summarizing his expected testimony, and attaching a
3 copy of his curriculum vitae listing his qualifications. Dkt. No. 66 at 18–36. Then, on
4 October 13, 2020, Defendants served Plaintiff with Mr. Sanchez’s expert report. Dkt. No.
5 67-1 at 6–7, ¶ 27, pp. 131–167 (Ex. P). Both disclosures were timely, and the Court finds
6 nothing in either that is so lacking as to warrant sanctions.

7 **D. The Court Declines to Award Sanctions in Favor of Defendants.**

8 Defendants seek sanctions against Plaintiff for having to respond to this Motion,
9 which Defendants characterize as “groundless.” Dkt. No. 67.⁴ Defendants seek sanctions
10 in the amount of \$6,032.50, which is based upon a “reasonable hourly rate” of \$475.00 per
11 hour for the time Defendants’ counsel spent responding to this Motion. *Id.*, Dkt. No. 67-1
12 at 11.

13 Because Plaintiff brought this Motion in part under Fed. R. Civ. P. 37, the Court
14 “must . . . require the movant, the attorney filing the motion, or both, to pay the party who
15 opposed the motion any reasonable expenses incurred in opposing the motion, including
16 attorney’s fees” unless “the motion to compel was substantially justified, or if other
17 circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(a)(5)(B); *see also*
18 *Glass Egg Digital Media v. Gameloft, Inc.*, No. 17-cv-04165-MMC(RMI), 2019 WL
19 5720731, at *4, *12 (N.D. Cal. Nov. 5, 2019) (declining to impose sanctions on the
20 unsuccessful moving party after finding other circumstances made such an award unjust
21 where neither party was “entirely blameless” with respect to the parties’ discovery issues).

22 The Court declines to order Plaintiff to pay Defendants’ attorney’s fees. Rule
23 37(a)(5)(B) only allows reimbursement of expenses and attorney’s fees that a party
24 “incurred.” *See Johnson v. Runnels*, No. 04-cv-0776-LKK-EFB-P, 2010 WL 760712, at
25

26
27 ⁴ Defendants also seek sanctions based upon alleged unprofessional conduct by Plaintiff’s
28 counsel. Because this conduct is the subject of the Court’s pending Order to Show Cause
(Dkt. No. 70), the Court does not address it here.

1 *2, *5-6 (E.D. Cal. Mar. 4, 2010) (finding a pro se plaintiff was not entitled to attorney
2 fees under Rule 37 because this expense was not actually incurred). Defendants'
3 submission does not establish what expenses or costs (if any) Defendants actually incurred
4 responding to Plaintiff's Motion. Instead, Defendants proffer, in conclusory terms, what a
5 reasonable fee would be based on the amount of the time Defendants' counsel spent
6 responding to the Motion. Dkt. No. 67-1 at 11, ¶ 53. This is insufficient to establish what,
7 if any, expenses Defendants incurred in responding to this Motion. Therefore, the Court
8 denies Defendants' request for sanctions.

9 **IV. Conclusion**

10 Based on the foregoing, the Court DENIES Plaintiff's Motion for Sanctions and
11 finds no basis to award Defendant any expenses for opposing this Motion.

12 **IT IS SO ORDERED.**

13 Dated: May 18, 2021

14 

15 _____
16 Honorable Daniel E. Butcher
17 United States Magistrate Judge
18
19
20
21
22
23
24
25
26
27
28